

March 18, 1994

Mr. Louis P. Soldano  
Senior Counsel  
Northern Natural Gas Company  
P.O. Box 1188  
Houston, Texas 77251-1188

Dear Mr. Soldano:

Your letter to Mr. Huntoon, Central Regional Director of the Research and Special Programs Administration's (RSPA) Office of Pipeline Safety (OPS) was referred to this office for response. The letter from Mr. Caskey, Code Compliance Engineer, to Mr. Kelly, former director of the Minnesota Office of Pipeline Safety (MnOPS), was also forwarded to us for response since it dealt with the authority of one of our interstate pipeline agents. In these letters concerns were expressed about OPS's inspection authority and MnOPS's authority as an interstate agent to request information.

Interviews.

In the letter to Mr. Huntoon, your first concern was whether an OPS inspector had authority to interview employees during the course of an inspection. You noted that the Occupational Safety and Health Act (OSHA) provides explicit authority to interview whereas OPS's authority under the Natural Gas Pipeline Safety Act (NGPSA), 49 U.S.C. app. § 1671 et seq., provides for inspection and examination of a pipeline operator's records and property. You further expressed concern that interviews are intrusive and could infringe upon basic constitutional protections.

OPS is authorized by the NGPSA to regulate natural gas pipelines for safety purposes. Congress, in enacting the NGPSA, found that the potential danger associated with the increase in the number and location of pipeline facilities, combined with population growth, the industry's spotty accident history, varied state regulation, and industry code shortcomings, justified the need for adequate safety standards and enforcement. H.R. Rep. No. 1390, 90th Cong. 2d Sess., reprinted in 1968 U.S. Code Cong. & Ad. News 3223, 3232-33. Thus, OPS's enforcement program is integral to carrying out its mission to protect life, property and the environment through a comprehensive pipeline safety program aimed at advance detection of potential hazards.

Section 14 of the NGPSA (49 U.S.C. app. § 1681 (a)) provides for the conduct of investigations to enforce the pipeline safety program. In conducting an on-site inspection at a pipeline facility, OPS inspectors use various investigative tools including employee interviews. Furthermore, OPS has always considered that since it has subpoena authority under section 14 to obtain information from a person, it can gather the same information through the informal interview process.

Interviewing employees of a regulated entity is a routine practice among agencies responsible for conducting safety inspections. For example, the Hazardous Materials Transportation Act (HMTA) (49 U.S.C. app. § 1808), authorizes RSPA's Office of Hazardous Materials Safety (OHMS) to conduct investigations to determine compliance with the HMTA and with the hazardous materials regulations. OHMS inspectors are authorized "to enter upon, inspect, and examine . . . the records and properties" of persons engaged in various hazardous materials transportation activities. In carrying out this authority, OHMS inspectors conduct interviews with employees of those entities being inspected.

Similarly, the Federal Railroad Administration (FRA), is authorized to determine compliance with the Hours of Service Act and under the Federal Railroad Safety Act, to inspect and examine rail facilities and pertinent records. See 45 U.S.C. §§ 64b and 437(b). Although neither authority specifically provides for interviews, FRA relies upon employee interviews, in addition to review of the records themselves, to determine compliance with these Acts.

OSHA's authority may be more explicit because OSHA's and OPSs regulatory mandates are different. OSHA has broad authority to regulate safety and health hazards in all workplaces, including businesses not traditionally regulated or found to be hazardous. Because its authority to inspect is so broad, OSHA needs a warrant to conduct routine nonconsensual inspections. However, inspections of pervasively regulated businesses or closely regulated industries, long subject to close supervision and inspection, are expected from the warrant requirement because persons who engage in these businesses do not have an expectation of privacy, are aware of the restrictions placed upon them, and thus, consent to routine, regulatory inspections. See Marshall v. Barlow's, Inc., 436 U.S. 307, 313 (1978).

Therefore, because OSHA's mandate to regulate working conditions is so broad, it seems that OSHA's enforcement authority would be more explicit than that of an agency, such as OPS, with authority directed specifically toward the pipeline industry. As with the warrant exception for closely regulated businesses, there is less of a need for the regulating agency to have explicit authority specifying the investigatory tools it may use during a compliance inspection.

As for your other concerns about employee interviews, constitutional protections against compulsory self-incrimination do not apply. An employee does not have to talk to an inspector during a site visit. However, RSPA may subpoena an employee under 49 U.S.C. app. § 1681 (a).

In addition, any business-sensitive information such as trade secrets given to an inspector during the conduct of an investigation is protected by the NGPSA's confidentiality provisions. See 49 U.S.C. app. § 1681 (e).

#### Accompanying employees.

Your next concern was with OPS inspectors accompanying an operator's personnel as these personnel perform their duties. You expressed concern about the risk posed to the inspectors and personnel due to the increased probability of an accident caused by the inspector's presence.

Observing operations is a necessary and logical corollary of OPS's authority to examine the properties of a pipeline operator to determine if an operator is in compliance with the pipeline safety laws and regulations. A good part of an inspection entails examination of an operator's records. However, because many of the regulations deal with operation and maintenance requirements, it is necessary to accompany personnel to observe if the proper procedures are being followed.

For example, an operator is required to prepare and follow a manual for written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies. Examining records will determine if the operator has the required procedures. However, the only way an inspector can determine if these procedures are being followed is to observe personnel as they are involved in the daily operations and maintenance of a facility. Ensuring that proper procedures are being followed is essential to pipeline safety because pipeline accidents are often the result of human error, particularly human error involving procedures.

OPS inspectors have engineering backgrounds and are well trained in pipeline operations. Their job is to observe, not to interfere with an employee's functions. No operator has ever reported that an OPS inspector interfered with a pipeline employee's ability to perform the job, or that an accident occurred due to an employee being distracted by an OPS inspector's presence.

### Notification.

Your last concern was with prior notification to OPS that an operator will be conducting particular operations.

OPS is responsible for protecting people and the environment by detecting pipeline problems before they occur. OPS may inspect a pipeline operator's operations at reasonable times and in a reasonable manner. See 49 U.S.C. app. § 1681(c). Since maintenance operations are critical to ensuring a pipeline's integrity, it is reasonable to request on occasion that an operator provide advance notice of these operations. Advance notice is particularly important with respect to non-routine operations.

Providing notice that an operation will be conducted is voluntary. However, OPS can subpoena the records of a facility's schedule in order to determine when a particular operation will be conducted. As with interviews, OPS prefers informal notification rather than resorting to the subpoena process. Furthermore, by requesting notice, OPS can minimize the time it spends at a facility. It would be disruptive to OPS to prolong its visit at a facility waiting for a particular operation to occur. Moreover, to the extent that an operator has personnel assigned to escort the OPS inspector, a prolonged inspection could be disruptive to an operator.

### MnOPS.

Mr. Caskey's letter to Mr. Kelly expressed concern that MnOPS, as OPS's interstate agent, did not have the authority to issue a request for specific information; requests such as this remain within the purview of OPS and should be issued by OPS Regional Offices.

MnOPS is authorized as an agent of OPS to conduct inspections of interstate pipeline operators and turn evidence of probable pipeline safety violations over to OPS. As provided in 49 C.F.R. § 190.203(c), OPS is authorized to issue requests for specific information, authority that has been delegated to the Regional Directors. Each Regional Director may allow an interstate agent to issue requests for specific information, with the coordination and concurrence of the Regional Director. The particular request referred to in the letter had been done at the Central Regional Director's recommendation and with his approval.

Furthermore, an agent's authority to conduct an inspection includes use of the same investigative tools that an OPS inspector would use, such as those previously described. If there are any concerns about an interstate agent overstepping its authority, such concerns can be directed to the Regional Director.

Please contact Barbara Betsock or Sherri Pappas at (202) 366-4400 if you have any more questions.

Sincerely,

Judith S. Kaleta  
Chief Counsel

cc: John Caskey  
Code Compliance Engineer

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